

35025
EB

SERVICE DATE – NOVEMBER 10, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-307 (Sub-No. 5X)

WYOMING AND COLORADO RAILROAD COMPANY, INC.—
ABANDONMENT EXEMPTION—IN CARBON COUNTY, WY

Decided: November 9, 2004

By petition filed on July 23, 2004, Wyoming and Colorado Railroad Company, Inc. (WYCO), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 23.71-mile line of railroad between milepost 0.57, near Walcott, and milepost 24.28, at Saratoga, in Carbon County, WY. Notice of the filing was served and published in the Federal Register (69 FR 49946-47) on August 12, 2004. Protests were filed by Intermountain Resources, LLC (IMR); the Saratoga-Carbon County Impact Joint Powers Board (JPB); the Town of Saratoga (Saratoga); and jointly by the State of Wyoming and Carbon County (Wyoming). WYCO filed a reply to the protests. As explained below, we will deny the petition for exemption.

PRELIMINARY MATTER

On October 19, 2004, IMR filed a motion to strike WYCO's reply to the protests or, alternatively, if that motion is denied, to strike specific statements from the reply. IMR contends that these statements are not supported by evidence in this proceeding. IMR also seeks leave to file a supplemental statement responding to allegations raised in WYCO's reply, and asks the Board to issue an order that would: (1) set the matter for oral hearing; (2) grant discovery requests requiring WYCO to make certain individuals available for depositions, and produce certain financial documents and other specified information; and (3) delay the deadline for issuing a decision on the merits of the petition until after completion of discovery and a hearing on the matter. On October 29, 2004, WYCO replied.

Although our regulations at 49 CFR 1104.13(c) do not permit filing replies to replies, we may do so in a particular instance if it is warranted. See, e.g., Buffalo & Pittsburgh Railroad Inc.—Abandonment Exemption—In Erie and Cattaraugus Counties, NY, STB Docket No. AB-369 (Sub-No. 3X), slip op. at 2 (STB served Sept. 18, 1998). Here, the supplemental statement that IMR seeks to file responds to new allegations raised in WYCO's reply to protests and more fully explains the factual situation. Thus, we will accept the supplemental statement for filing to complete the record in this proceeding. However, because we are denying the petition for exemption, IMR's motion to strike and for other relief is moot.

BACKGROUND

WYCO acquired the line from the Union Pacific Railroad Company (UP) in 1987. See Wyoming and Colorado Railroad Company, Inc.—Acquisition and Operation Exemption — Certain Lines of Union Pacific Railroad Company, Finance Docket No. 31140 (ICC served Nov. 30, 1987). WYCO states that the last active rail shipper on the line, Louisiana-Pacific Corporation (LP), operated a sawmill in Saratoga that was closed in January 2003. According to WYCO, LP shipped an average of 75 cars per month under annual “take-or-pay” contracts that permitted WYCO to operate the line on a marginally profitable basis. WYCO began the abandonment process in June 2003 but suspended its efforts when it learned that another company was interested in purchasing and reopening the sawmill. WYCO submits, however, that the parties were unable to reach an arrangement that would enable WYCO to continue operating the line on a profitable basis. Assertedly, WYCO was informed that the sawmill would instead use the nearby transload facilities operated by UP at Rawlins, WY.

IMR states that it purchased the sawmill on September 26, 2003, but has delayed reopening the plant until it acquires sufficient timber resources in the area to sustain operations. Assertedly, IMR will be contracting with the U.S. Forest Service (Forest Service) to purchase and harvest 100 million board feet of bug-infested timber over the next several years, which, together with other available timber, was expected to enable the sawmill to be reopened by October 15, 2004. Initially, IMR expects to ship between 70 and 80 cars per month, but anticipates that its traffic will increase to between 95 and 120 cars per month after the facility is upgraded (approximately 6 months after opening). IMR argues that rail service from WYCO is the only practical or economically feasible transportation alternative because the UP rail line in Rawlins is approximately 50 miles from the sawmill. Moreover, if WYCO’s service is not available, IMR submits that it would have to acquire its own fleet of trucks because there are virtually no commercial trucking services that serve the area. IMR states that it is willing and able to enter into an agreement similar to the one that WYCO had with LP.

JPB, Saratoga, and Wyoming all oppose the petition for exemption, arguing that abandonment will substantially impair economic and community development in Carbon County. The labor force in Carbon County is approximately 7,744 and LP was a major employer in the community. According to JPB, the loss of jobs for 130 direct employees and many contract employees when LP closed the sawmill was a major blow to the economy in the area. Moreover, JPB contends that, if IMR does not reopen the sawmill, there will be no purchaser for the timber that the Forest Service seeks to sell under its healthy forest management plan.

Wyoming states that, during the first year of operations, the sawmill would provide more than 70 full-time jobs, produce \$2.94 million in new payrolls, and increase county tax revenue by \$47,290. Moreover, Wyoming projects that in year two, the sawmill will provide 110 jobs and produce more than \$4.6 million in payrolls; by year five, this will increase to 115 jobs and over \$5 million in payrolls.

Wyoming argues that the petition for exemption should be denied because WYCO has not presented evidence to show that the line cannot be made profitable, and, moreover, IMR has submitted substantial evidence that alternative transportation options are not available. Thus, Wyoming argues that the evidence presented demonstrates that the interests of the public in continued rail service in this area substantially outweigh WYCO's need to close down the line.

As an alternative to outright denial, Wyoming requests that, pursuant to 49 CFR 1121.4(c)(1)(i), we direct WYCO to file additional information regarding the financial condition and profitability of the line in light of impending contracts for rail service that will arise with the reopening of the sawmill. In addition, Wyoming requests an oral hearing regarding the petition for exemption. However, in the event that the petition for exemption is granted, Wyoming requests that we impose a public use condition under 49 U.S.C. 10905 requiring that the line and properties remain in place for an additional 180 days.

In reply, WYCO submits that protestants have failed to show that rail service is essential or that the sawmill is economically incapable of moving its finished products by truck to UP's transload facilities. WYCO also argues that the jobs lost after LP ceased operations are long gone, not because of lack of rail service, but because the sawmill did not earn adequate returns on its investment. Moreover, WYCO asserts that, after IMR filed its protest, IMR informed WYCO that the facility would not open on October 15th and that IMR is not yet prepared to discuss a transportation contract. In any event, WYCO states that the contracts that it had with LP were not providing sufficient funds to enable WYCO to perform normalized maintenance on the line. Thus, because the line has been out of service for nearly 2 years, WYCO argues that there would be substantial costs associated with resuming operations over the line. Also, WYCO asserts that it has forgone opportunity costs over the years. WYCO submits that the Board and its predecessor have consistently rejected speculation about future traffic as a basis for denying the abandonment of an otherwise unprofitable rail line. WYCO notes that protestants can invoke the financial assistance provisions of 49 U.S.C. 10904 to subsidize WYCO's continued operations or to acquire the line for its net liquidation value.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from otherwise applicable regulatory requirements or procedures when we find that: (1) those requirements or procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The exemption process is designed to minimize regulatory burdens. An exemption is appropriate when we have sufficient information to reach an informed decision. Typically, the types of abandonment and discontinuance proposals that are authorized through the exemption process are those where shippers do not contest the abandonment or, if they do contest it, the revenue from the traffic on the line is clearly marginal compared to the cost of operating the line. See Boston and Maine Corporation—Abandonment Exemption—In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) et al., slip op. at 5 (STB served Dec. 31, 1996) (Boston and Maine); Tulare Valley Railroad Company—Abandonment and Discontinuance Exemption—In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X), slip op. at 8 (STB served Feb. 21, 1997); San Joaquin Valley Railroad Company—Abandonment Exemption—In Kings and Fresno Counties, CA, STB Docket No. AB-398 (Sub-No. 4X), slip op. at 4 (STB served May 23, 1997), aff'd (STB served Mar. 5, 1999). Where there is an inadequate record on which to grant a petition for abandonment exemption, the petition will be denied. See Boston and Maine, slip op. at 6.

As in any abandonment case, whether authority is sought by application or petition, the railroad must demonstrate that the line in question is a burden on interstate commerce. Typically, in an attempt to make that showing, the carrier submits evidence to demonstrate that the costs it incurs exceed the revenues attributable to the line. While abandonment decisions are not based solely on mathematical computations and considerations, the petitioner bears the burden of showing that keeping the line in service (or, as here, available for service) would impose a burden on it that outweighs the harm that would befall the shipping public, and the adverse impacts on rural and community development, if the rail line were abandoned. See Gauley River Railroad, LLC —Abandonment and Discontinuance of Service—In Webster and Nicholas Counties, WV, STB Docket No. AB-559 (Sub-No. 1X) et al., slip op. at 7 (STB served June 16, 1999).

In this proceeding, the evidence presented is not sufficient for us to make an informed decision on the merits of the proposed abandonment exemption. IMR states that it intends to reopen the sawmill and claims that it will generate enough traffic to once again make the line profitable, while WYCO's argument that the line cannot be operated on a profitable basis is not supported by any cost or other evidence. In addition, WYCO does not present any cost evidence to support the contentions made in its reply that it has forgone opportunity costs, or that the line, when it was operated, did not generate sufficient revenues to allow for normalized maintenance and that, as a result, substantial costs would be incurred in resuming operations.

Moreover, while traffic has not moved over the line since January 2003, WYCO was aware that a new shipper is interested in reopening the sawmill, and WYCO should have anticipated that there would be opposition to the abandonment request. Under these circumstances, it would have been prudent for WYCO to submit cost evidence, supported by detailed workpapers, to enable us to assess the profitability of the line. Therefore, upon review of the record before us, we conclude that WYCO

has not met the criteria in 49 U.S.C. 10502. Accordingly, we will deny the petition for exemption without prejudice to WYCO's either refiling a petition for exemption or filing a formal abandonment application to provide the additional information that we would need. (Any new filing must be under a new docket sub-number, accompanied by a new filing fee.)

Our denial of WYCO's petition for exemption moots the labor protection and environmental issues that have been raised, as well as Wyoming's request for investigation, a public hearing, or a public use condition.

It is ordered:

1. IMR's motion to file a supplemental statement is granted.
2. WYCO's petition for exemption is denied.
3. This decision is effective on the date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary